Supreme Court, U.S.
FILED
NOV 30 1994
OFFICE OF THE CLERK

No. 94-771

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

OKLAHOMA TAX COMMISSION,

Petitioner

v.

CHICKASAW NATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ROBERT S. BASSMAN
*ALPHONSE M. ALFANO
BASSMAN, MITCHELL & ALFANO, CHARTERED
1201 New York Avenue, N.W.
Suite 1275
Washington, D.C. 20006
(202) 466-6502
Counsel for Amicus Curiae

**Counsel of Record*

22 pp

TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE 2

ARGUMENT 3

I. THOSE RESPONSIBLE FOR THE COLLECTION AND REMITTANCE OF MOTOR FUEL EXCISE TAXES ARE INSULATED FROM THE TAX BURDEN 6

II. THERE CAN BE NO UNLAWFUL INTERFERENCE WITH TRIBAL SELF-GOVERNMENT IN THE ABSENCE OF AN APPRECIABLE TAX BURDEN 9

III. THE PRINCIPLES ESTABLISHED BY THE TENTH CIRCUIT SERIOUSLY JEOPARDIZE THE EXISTENCE OF INDEPENDENT PETROLEUM MARKETERS 11

IV. THE PRINCIPLES ESTABLISHED BY THE TENTH CIRCUIT SERIOUSLY JEOPARDIZE THE ABILITY OF THE FEDERAL AND STATE GOVERNMENTS TO RAISE REVENUES THROUGH MOTOR FUEL TAXES 13

CONCLUSION 15

TABLE OF AUTHORITIES

Cases: Page

Department of Finance and Taxation of New York v. Milhelm Attea & Bros., 114 S.Ct. 2028, 2036 (1994) 11, 13

Gurley v. Rhoden, 421 U.S. 200, 204 (1975) 7, 9

Moe v. Salish & Kootenai Tribes, 425 U.S. 463, 483 (1976) 6, 11

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 155 (1980) 13

Statutes:

26 U.S.C. §4081 7

26 U.S.C. §4081(a)(1)(B) 7

26 U.S.C. §4081(a)(2) 14

Okla. Stat., tit. 68, §504 8

Okla. Stat., tit. 68, §504.1 8

Okla. Stat., tit. 68, §505B 7, 10

Okla. Stat., tit. 68, §505C 7, 10

Okla. Stat., tit. 68, §509.2A 9

Okla. Stat., tit. 68, §509.2C 9

Okla. Stat., tit. 68, §509.2F 9

Okla. Stat., tit. 68, §518 8

Okla. Stat., tit. 68, §519 8

Okla. Stat., tit. 68, §523 8

Okla. Stat., tit. 68, §523.1 8

Other Authorities:

139 Cong. Rec. H6098 (daily ed. Aug. 4, 1993) 14

139 Cong. Rec. H6132 (daily ed. Aug. 5, 1993) 14

139 Cong. Rec. S10683 (daily ed. Aug. 6, 1993) 14

139 Cong. Rec. S10728 14

Bureau Of Indian Affairs,
Division Of Trust Responsibilities,
U.S. Dept. Of Interior, Acreages Of
Indian Lands By Area and State 3 (1990) 13

Federal Highway Administration,
U.S. Dept. of Transportation,
Monthly Motor Fuel Reported By State
(July 1994) 12

Federal Highway Administration,
U.S. Dept. of Transportation,
Highway Statistics 83 (1992) 13

U.S. Energy Information Administration,
Petroleum Marketing Monthly, Table 13,
March 1994 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No. 94-771

OKLAHOMA TAX COMMISSION,

Petitioner

v.

CHICKASAW NATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petroleum Marketers Association of America (PMAA) respectfully submits this brief *amicus curiae* in support of the petition for writ of certiorari filed by the Oklahoma Tax Commission in this case. Written consent to the filing of this brief has been obtained from all parties. The original letters authorizing consent have been filed concurrently herewith.

INTEREST OF AMICUS CURIAE

The PMAA is a federation of 43 state and regional trade associations representing over ten thousand small business petroleum marketers.1/ Together, PMAA members market approximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply over one-half of the Nation's retail motor fuel facilities,2/ approximately three-quarters of which are operated by independent retailers. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products as well as chain retailers that market motor fuels through service station outlets.

The PMAA's interest in this case is direct and substantial. At issue is a decision of the Tenth Circuit Court of Appeals3/ that impacts on the ability of petroleum marketers to compete with Tribal retailers that sell motor fuel to non-members for use almost exclusively on state roads outside of Indian country, and who enjoy a significant competitive advantage that stems from an exemption from the payment of motor fuel taxes. In an industry

---

1/ A list of the constituent state and regional trade associations that comprise the PMAA is set forth in the Appendix hereto.

2/ Independent marketers own or lease over 49,800 retail facilities nationwide and store fuel at over 10,000 additional "bulk plants." PMAA's 1993 member survey discloses that its members supplied 76,608 of America's approximately 150,000 retail motor fuel distribution outlets (e.g. gasoline stations, truck stops, convenience stores etc.). Their 280,000 full-time employees serviced this network with roughly 100,000 vehicles and they bear the credit costs and risks of approximately $13 billion in credit card sales that they and their dealers make to the American motoring public annually.

3/ The opinion of the court of appeals is reported at 31 F.3d 964. Judgment was entered by the court of appeals on July 29, 1994.

characterized by intense price rivalry, and with average *combined* wholesale and retail margins running in the neighborhood of fourteen cents per gallon,4/ a cost advantage to Indian retailers of anything approaching the per gallon amount of the excise tax ($0.17 per gallon) would severely disrupt motor fuel markets in the State of Oklahoma and would eliminate competition entirely.

Moreover, the interest of PMAA members is directly related to and aligned with the interest of the State of Oklahoma. To the extent that tax-exempt Tribal enterprises gain market share at the expense of existing marketers, the ability of the State to raise revenue through motor fuel excise taxes would be severely diminished. In the same vein, to the extent that the Tenth Circuit's decision is established as the guiding principle for determining the tax-exempt status of Tribal enterprises, the decision would have far-reaching implications for the Nation's petroleum marketing industry and the other federal and state jurisdictions that raise revenue through motor fuel taxation. Officially recognized "Tribal land" exists in some 32 states that generate in excess of $15 billion annually in motor fuel taxes. These taxes are remitted to the state taxing authorities primarily by wholesale and retail marketers whose place in the chain of distribution is in serious jeopardy as a result of the decision at issue here.

ARGUMENT

For decades, the federal and state governments collected taxes on the sale of motor fuels designated for on-road use, and they dedicated the proceeds thereof to various trust funds used for the construction and maintenance of the Nation's highway system. The segregation of highway trust funds from general revenues has

---

4/ See p. 12 *infra*.

traditionally been predicated on the notion that motor fuel taxes are, in reality, user fees that should rightfully be reserved for highway use. In the federal system, for example, exemptions in the form of refunds are granted for off-road use, "reflect[ing] a congressional determination that, because the economic burden of such taxes is traditionally passed on to the purchaser-consumer in the form of increased pump prices, ... off-highway users should be relieved of the economic burden of the highway program..." *Gurley v. Rhoden*, 421 U.S. 200, 206 (1975).

Throughout this period, therefore, there has never been a question as to who bears the ultimate economic burden of the tax. Both in theory and in reality, the burden of the tax falls exclusively on motorists. Irrespective of the legal incidence of taxation, the full amount of the tax is routinely passed down the chain of distribution to the ultimate consumer.

While legislative debate concerning the level of taxation has traditionally centered on the impact of the tax on the consumer, an entirely different set of considerations is involved in determining the point in the distribution chain at which motor fuel taxes are collected and remitted, and hence the legal incidence of the taxation. Primary among these factors is the efficiency and economy with which motor fuel taxes can be collected, remitted to the appropriate governmental authority, and accounted for. The question in this regard is whether the interests of the federal and state governments are better served through collection of the tax from thousands of retailers, hundreds of distributors, or a handful of refiners and terminal operators. The legal incidence of the tax, therefore, is not likely to fall at the same point in the chain of distribution as the tax burden.

The decision of the court below stands for the proposition that a tax exemption attaches to Tribal enterprises that exist at any point in the chain of distribution that is coincident with the

legal incidence of taxation. It applies, moreover, irrespective of whether the motor fuel transported onto Indian country is for resale only and used almost exclusively off of Indian country on State jurisdiction roads. If the decision is allowed to stand, Tribal enterprises could shift their business activities up or down the distribution chain so as always to incur the legal incidence of taxation, thus meriting an exemption from the tax, and secure for themselves a price advantage with which no petroleum marketer could contend. The impacts of such tax-exempt competition would be devastating to independent terminal operators, distributors and retailers.

While the impact on marketers bears no direct relevance to the considerations involved in determining whether the tax intrudes impermissibly on Indian sovereignty, it bears ultimately on the manner in which the State of Oklahoma is affected. To the extent that petroleum marketers are displaced in the distribution scheme by non-tax paying Indian enterprises, the ability of the State to raise revenue through motor fuel excise taxes would be severely diminished. Thus, the threat to the State stems not only from existing revenue losses but from the market share growth that tax-exempt tribal enterprises will inevitably gain at the expense of existing marketers.

Moreover, because the Tenth Circuit views infringements on Tribal sovereignty as stemming from the legal incidence of taxation, as opposed to the tax burden, the impact on the State's ability to generate revenue through motor fuel taxes cannot be remedied by simply changing the point at which the legal incidence lies. If the Oklahoma legislature were to shift the legal incidence of the tax, for example, to the distributor, Tribal enterprises could operate as effectively at the distributor level as they do now as retailers. Thus, the potential for serious market dislocations and revenue losses lies in the notion that the incidence of the tax, and not the tax burden, is the measure of the

impact on Tribal self-government. If such a notion is to be the guiding principle in determining the tax-exempt status of Tribal enterprises, the ability of most states and the federal government to raise revenue through motor fuel taxes is in serious jeopardy.

Given the compelling state interest involved, and the fact that the economic burden of motor fuel taxation does not fall on the Tribe, the traditional balancing of interests should come down squarely on the side of the State. As this Court has often stated, any requirement that Tribes shoulder obligations related to tax collection and remittance does not impermissibly infringe upon Tribal self-government. *Moe v. Salish & Kootenai Tribes*, 425 US. 463, 483 (1976). The power to raise revenue, however, is at the core of state sovereignty.

I. THOSE RESPONSIBLE FOR THE COLLECTION AND REMITTANCE OF MOTOR FUEL EXCISE TAXES ARE INSULATED FROM THE TAX BURDEN

It is axiomatic that the collection of motor fuel taxes directly from hundreds of thousands of individual motorists is not an efficient or economic means of tax collection, and is riddled with a host of other problems related to an orderly administration and enforcement of the tax laws. For this reason, the federal government and the several states place the responsibility for collection and remittance on various entities in the chain of distribution, such as refiners, terminal operators, wholesale distributors and retailers. While these entities are legally responsible for collection and remittance, they are insulated and held harmless from the economic burdens of the tax.

The party responsible for remitting motor fuel tax to a federal or state taxing authority routinely passes the tax along to the purchaser at the next level of distribution as part of the

purchase price. *See, e.g., Gurley v. Rhoden*, 421 U.S. 200, 204 (1975) ("the economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise.") At the federal level, for example, refiners and, in some cases, terminal operators, are responsible for remitting federal excise taxes to the Internal Revenue Service.5/ The full amount of the tax, however, is recouped in sales to distributors and retailers. In fact, refiner invoices routinely contain a separate line item showing the per gallon amount of the motor fuel tax. Likewise, distributors that purchase from refiners pass along the full amount of the tax, shown as a separate line item on invoices, to their retailer customers. Retailers then recoup the full amount of the tax in their sales to motorists.

Similarly, according to the laws of the State of Oklahoma, distributors are responsible for remittance of the tax to the state taxing authority. Okla. Stat., tit. 68, §505B-C. While there is no formal requirement that the tax be included in the distributor's price to a retailer, common sense dictates that distributors are unwilling and, given market realties, unable to absorb the tax; they pass it along to their retailer customers.6/ As the district court noted, "[t]he retailers wholesale price will include the motor fuel taxes which are in turn included in the retail price at the

---

5/ The federal government imposes an excise tax on gasoline and diesel fuel. 26 U.S.C. §4081 (Supp. 1994). The tax is imposed on:

> (a)(1)(A)(i) the removal of a taxable fuel from any refinery;
> (ii) the removal of a taxable fuel from any terminal.

The only exemption from this imposition of tax is for "bulk transfers to registered terminals or refineries." 26 U.S.C. §4081(a)(1)(B) (Supp. 1994).

6/ Indeed, the per gallon amount of the tax exceeds the distributor's margin on such sales. See p. 12 *infra*.

pump." Slip. Op. at 35a.7/ So common is the understanding that motor fuel taxes are user fees paid by the ultimate consumer that over seventy percent of the revenues derived from the Oklahoma tax are deposited in the State Transportation Fund for use in highway construction. Okla. Stat., tit. 68, §§504, 504.1, 518, 519, 523, 523.1 (1994). Most of the remainder is given to counties and municipalities for road maintenance. *Id.*

The parties that bear the legal incidence of motor fuel taxation, therefore, do not bear the economic burden of the tax. While they bear a certain administrative burden, the impact thereof is usually mitigated by the economic benefits that flow from their status as remitters. Because the collection and remittance of the tax do not occur simultaneously, with remittance required only at periodic intervals, those who collect the tax have the use of the proceeds for a period of time before they are required to be forwarded to the appropriate governmental authority. The use of the money, commonly referred to in the industry as the "float," is a valuable asset to entities existing at every level of distribution.

Thus, the parties on whom the legal incidence of taxation falls are not the tax payers. They are, in effect, collection agents who are insulated and held harmless from the economic burdens of taxation, and whose responsibility to remit the tax is often an economic asset. Because their responsibilities to collect and remit the tax are unrelated to motor fuel use, and are unrelated to the

---

7/ The decision of the United States District Court for the Eastern District of Oklahoma, which has not been reported, is attached to the brief of the Oklahoma Tax Commission as Appendix B. The decision will heretofore be cited as "Slip Op. at _____."

economic burden of taxation, they bear no rational relationship to the need for a tax exemption.8/

II. THERE CAN BE NO UNLAWFUL INTERFERENCE WITH TRIBAL SELF-GOVERNMENT IN THE ABSENCE OF AN APPRECIABLE TAX BURDEN

The legal incidence of motor fuel taxation is a matter of state law. Accordingly, any determination of the legal incidence turns on an analysis of the enabling tax legislation and, consistent therewith, a determination of the party on whom the tax is imposed. Traditionally, the incidence of motor fuel taxation coincides with the party held accountable for the tax, usually the party responsible for remittance and in whose vendees no sanction lies for failure to pay. *See, e.g. W.M. Gurley v. Arny Rhoden*, 421 U.S. at 205-206. In the instant case, however, the court of appeals found the legal incidence of Oklahoma's motor fuel tax to reside with the retailer even though it is collected and remitted at the distributor level. 31 F.3d at 971. Although the court of appeals acknowledged that the statutory language is not clear, it rested its conclusion on a provision which indicated that

---

8/ Tax exemptions are normally granted for reasons related to the use of motor fuel by consumers and not on the basis of the status of an entity as a tax collector or remitter. Because motor fuel taxes are regarded as user fees, for example, Oklahoma's tax is not due on diesel fuel "used exclusively for purposes other than to operate motor vehicles on the public highways of this state." Okla. Stat. tit. 68, §509.2A (Supp. 1994). Similarly, motor fuel used for public purposes is sometimes subject to an exemption. For example, fuel purchased by a county, city, or town for use in its vehicles is normally exempt from the Oklahoma tax. *Id.*, §509.2F. Any person who places tax-exempt diesel fuel into the tank of a motor vehicle "shall be liable for the tax." *Id.*, §509.2C.

distributors collect the tax and remit it "on behalf of licensed retailers." 31 F.3d at 971.

While the court of appeals correctly noted the distinction between the economic burden of the tax and its legal incidence,9/ it stopped short of examining whether the imposition of the tax, without the economic burden, has any appreciable impact on tribal self-government. The court makes no mention of the fact that the Tribe carries none of the burdens normally associated with the party on whom the tax is imposed. Not only is the Tribe insulated from the economic burden of taxation, it has no responsibility for the preparation of monthly reports or the collection and remittance of the tax. Oklahoma statutes place these responsibilities in the hands of the distributor. Okla. Stat. tit. 68 §505B-C. Nor is the Tribe subject to any sanction for failing to collect the tax from consumers or failing to remit it to the distributor. Thus, the contention that imposition of the tax on the Tribe impermissibly interferes with Tribal sovereignty is implausible.

In rendering its decision, the court of appeals refused to recognize that it is the burdens of taxation that carry the potential for infringing impermissibly on tribal sovereignty and not the manner in which the Oklahoma statute is worded. Indeed, the court of appeals refused even to concede that the economic burden of the tax falls on the ultimate consumer. Although the economic burden was obvious to the district court, the district court's conclusion was characterized by the court of appeals as

---

9/ See 31 F.3d at 972 ("The question of who bears the ultimate economic burden of the tax is distinct from the question on whom the tax has been imposed.")

being grounded in "economic assumptions"10/ which the court refused to substitute for the language of the statute. In short, the court of appeals ignored the only element of taxation that could possibly impact on Tribal sovereignty,11/ and it applied a conclusive presumption, based on legal incidence alone, against the validity of the tax.

III. THE PRINCIPLES ESTABLISHED BY THE TENTH CIRCUIT SERIOUSLY JEOPARDIZE THE EXISTENCE OF INDEPENDENT PETROLEUM MARKETERS

To the extent that the Tenth Circuit's decision accurately reflects the governing principle regarding the tax exempt status of Tribal enterprises engaged in the sale of motor fuel, such enterprises are capable of devastating their competition at every level in the distribution chain. To the extent that Tribal enterprises operate as retailers, distributors, or terminal operators, or engage in motor fuel marketing at any point in the chain of distribution that bears the legal incidence of taxation, they would be entitled to a wholesale tax exemption. The cost advantages inherent in purchasing motor fuel on a tax exempt basis would provide Tribal enterprises with a corresponding resale price

---

10/ 31 F.3d at 971.

11/ Even if the Tribe were required to bear the administrative burdens normally associated with imposition of the tax, there would have been no impermissible interference with Tribal sovereignty. The administrative and other burdens associated with collecting and remitting a tax are not burdens that frustrate Tribal self-government. *Moe v. Salish & Kootenai Tribes*, 425 U.S. at 483. States are free, therefore, to "require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection..." *Id.* at 483. *See also, e.g., Department of Finance and Taxation of New York v. Milhelm Attea & Bros.*, 114 S.Ct. 2028, 2036 (1994).

advantage with which no one could compete. In an industry characterized by intense price rivalry, the difference of a penny or two (not to mention something on the order of Oklahoma's seventeen cent motor fuel tax) would guarantee Tribal terminal operators, distributors and retailers a limitless share of the market.

For example, in 1993, the entire price differential between the Nation's refiners' selling price of gasoline to resellers and the price consumers paid for that gasoline averaged only 14 cents per gallon.12/ Even if competing wholesalers and retailers sold their product at cost, they could not compete with Tribal enterprises that enjoyed a price advantage in the amount of the per gallon state or federal motor fuel tax. For the year 1994, state motor fuel taxes ranged from 8 cents per gallon in Alaska (gasoline) to 27.75 cents per gallon in Montana (diesel). Nationally, the average tax placed on a gallon of gasoline (federal and state) is 36.93 cents. On diesel, the average is 43.28 cents per gallon.13/

Thus, the Tenth Circuit's decision has ramifications in every state that taxes the on-road use of motor fuel. The implications of the decision extend as well to the federal motor fuel tax system which places the legal incidence of taxation at the refiner or terminal operator level. Were recognized Indian tribes to engage in motor fuel refining, their ability to diminish the

---

12/ The U.S. Energy Information Administration reports "Sales For Resale" of gasoline in 1993 averaging 62.5 cents a gallon and sales "Through Company Outlets" averaging 76.5 cents a gallon. U.S. ENERGY INFORMATION ADMINISTRATION, PETROLEUM MARKETING MONTHLY, TABLE 13, (March 1994).

13/ FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, MONTHLY MOTOR FUEL REPORTED BY STATE (July 1994).

market shares of existing refiners, and hence the revenues generated from federal motor fuel tax payments, would be limited only by the amount of capital they could attract to increase their refining capacity. This Court has consistently "rejected the proposition that 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Milhelm Attea*, 114 S.Ct. at 2035 quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

As developed more fully below, the application of such a principle would have a devastating impact on the ability of the federal and state governments to raise revenues through motor fuel taxes.

IV. THE PRINCIPLES ESTABLISHED BY THE TENTH CIRCUIT SERIOUSLY JEOPARDIZE THE ABILITY OF THE FEDERAL AND STATE GOVERNMENTS TO RAISE REVENUES THROUGH MOTOR FUEL TAXES

The amount of revenue generated in 1992 by the 32 states in which the U.S. Bureau of Indian Affairs reports "Tribal land"14/ was in excess of $15 billion annually,15/ representing over sixty-four percent of all of the state motor fuel

---

14/ BUREAU OF INDIAN AFFAIRS, DIVISION OF TRUST RESPONSIBILITIES, U.S. DEPT. OF INTERIOR, ACREAGES OF INDIAN LANDS BY AREA AND STATE 3 (1990).

15/ FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, HIGHWAY STATISTICS 83 (1992).

tax revenues generated nationwide.16/ The funds generated by these states for motor fuel taxation is used principally for state highway capital outlay maintenance and administration. The major secondary use for these funds is for local roads and streets. Less than 8 percent of the total is expended for non-highway purposes.17/

In 1992, the federal government raised almost $15 billion from motor fuel taxation, the overwhelming bulk of which was diverted to the highway trust fund, with the remainder going to mass transit projects aimed, among other things, at curtailing motor fuel use.18/ In 1993, the federal government raised the per gallon amount of gasoline tax from 14.1 cents to 18.4 cents. The federal tax on diesel fuel went from 20.1 cents per gallon to 24.4 cents per gallon. 26 U.S.C. §4081(a)(2)(Supp. 1994).

In short, motor fuel taxation is a significant source of revenue at both the state and federal levels, and it is essential to the future development and maintenance of the Nation's highway system. The decision at issue here seriously threatens the ability of federal and state taxing authorities to maintain revenues generated from motor fuel taxation at current levels. If motor fuel taxes cannot be imposed on Tribal enterprises that are held

---

16/ *Ibid.*

17/ *Ibid* at p. 82.

18/ The legislative deliberations leading up to the increase focused on a number of factors, prominent among which was the impact of the increase on consumers who Congress recognized as bearing the ultimate economic burden of the taxation. *See, e.g., 139 Cong. Rec. H6098 (daily ed. Aug. 4, 1993) (remarks of Cong. Poshard); 139 Cong. Rec. H6132 (daily ed. Aug. 5, 1993) (remarks of Cong. Fowler); 139 Cong. Rec. S10683 (daily ed. Aug. 6, 1993) (remarks of Sen. Lott); Id. at S10728-29 (remarks at Sen. Biden).*

harmless from the economic burdens of the tax, an irresistible incentive would be created to convert their tax-free license into an ever-increasing share of motor fuel markets. The incentive would extend, moreover, to non-Indian investors whose capital would be necessary, in some cases, to make such an expansion a reality. The inevitable expansion of Indian enterprises at the expense of existing marketers would have dire consequences for the collection of motor fuel taxes at the state and federal level.

The governmental interests at stake, therefore, are compelling. They should take precedence even if the imposition of the tax had some appreciable impact on Tribal self-government. Here, however, the impact in non-existent. No rational basis exists for these important governmental interests to yield to abstract principles that have no direct bearing or practical impact on Tribal sovereignty.

CONCLUSION

On the basis of the foregoing, the decision of the Tenth Circuit Court of Appeals in this case should be reversed.

RESPECTFULLY SUBMITTED,

ROBERT S. BASSMAN
*ALPHONSE M. ALFANO
BASSMAN, MITCHELL &
ALFANO, CHARTERED
1201 New York Avenue, N.W.
Suite 1275
Washington, D.C. 20006
(202) 466-6502
Counsel for Amicus Curiae

**Counsel of Record*
November 30, 1994

APPENDIX

Amicus Curiae, Petroleum Marketers Association of America, is a non-profit trade association comprised of the following associations:

Alabama Oilmen's Association
Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent Connecticut Petroleum Association
Independent Oil Marketers Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Minnesota Petroleum Marketers Association
Mississippi Petroleum Marketers Association
Missouri Petroleum Marketers Association
Montana Petroleum Marketers Association
Nebraska Petroleum Marketers, Inc.
Nevada Petroleum Marketers Association
New England Fuel Institute
New Mexico Petroleum Marketers Association
North Carolina Petroleum Marketers Association

Ohio Petroleum Marketers Association
Oklahoma Petroleum Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
Petroleum Marketers Association of Wisconsin, Inc.
South Carolina Petroleum Marketers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Utah/Western Petroleum Marketers Association
Virginia Petroleum Jobbers Association
Washington Oil Marketers Association
West Virginia Petroleum Marketers Association
Wyoming Petroleum Marketers Association